SUPREME COURT, U. S.

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MAR 22 1958
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 801

G. W. THOMAS DRAYAGE & RIGGING COMPANY, INC., a corporation, W. R. BALLINGER & SON, a corporation, and MINNA M. BALLINGER,
Petitioners,

vs.

INDUSTRIAL INDEMNITY COMPANY, a corporation; INDUSTRIAL INDEMNITY EXCHANGE, a reciprocal exchange; T. G. McGUIRE, E. A. MATHIESSEN, S. E. HODAPP, J. V. CHAMBERS, M. S. FIELDS, E. E. URSIN, D. W. SCHIEBEL, W. A. HALUK, R. E. MAY, JR., R. L. JONES, JR., FRED DREXLER, N. S. YOUNG, THOMAS SOULE, J. P. TAHENY and V. E. HOWARD, JR., doing business as Industrial Service Company, a copartnership, HENRY J. KAISER, K. K. BECHTEL, S. D. BECHTEL, JOHN A. McCONE, W. A. BECHTEL, JR., T. G. McGUIRE, E. S. DULIN, F. SOMERS PETERSON, JAMES M. SMITH, M. I. SMITH, ALDEN G. ROACH, ROBERT L. BRIDGES, H. S. LORD, A. F. BISHOP, all of the aforesaid doing business as INDUSTRIAL UNDERWRITERS, a partnership, K. K. BECHTEL, L. T. KETT, F. SOMERS PETERSON, J. W. SCAMMELL, G. G. SHERWOOD, EMERSON SPEAR, A. G. STREBLOW, G. J. THOMPSON, W. E. WASTE, JOSHUA HENDY IRON WORKS, a corporation, INTERNATIONAL ENGINEERING COMPANY, INC., a corporation, and MARINE TERMINALS CORPORATION, a corporation,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief for Respondents in Opposition

MAX THELEN
ROBERT L. BRIDGES
111 Sutter Street
San Francisco 4, California

Attorneys for Respondents

THELEN, MARRIN, JOHNSON & BRIDGES
EDWARD J. RUFF
111 Sutter Street
San Francisco 4, California

Of Counsel

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

SUBJECT INDEX

	Pages
Opinions Below	1
Jurisdiction and Restatement of Questions Presented	2-3
Statement of the Case	3-10
Argument	10-18
A. The Petition Should Be Denied Because the Federal Question Sought to Be Reviewed Was Not Properly Raised and Preserved in the State Courts as Indicated by the Certified Record	10-13
B. The Petition Should Be Denied Because the Judgment Is Based on Independent Non-Federal Grounds Adequate to Sustain It	13-16
C. The Petition Should Be Denied Because There Is No Substantial or Any Federal Question Which Exists	16-18
Conclusion	18

TABLE OF AUTHORITIES CITED

Cases	Pages
American Surety Co. v. Baldwin, 287 U.S. 156 (1932)	11, 14
Bailey v. Anderson, 326 U.S. 203 (1945)	14
Bradley v. Bradley, 94 C.A. 2d 310, 211 P.2d 638 (1949)	11
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930)	13
Davenport v. Stratton, 24 C.2d 232, 149 P.2d 4 (1944)	10
Davidson v. New Orleans, 96 U.S. 97 (1877)	17
Edelman v. California, 344 U.S. 357 (1952)	10, 14
England v. Hospital of Good Samaritan, 14 C.2d 791, 97 P.2d 813 (1939)	13
Estate of Kent, 6 C.2d 154, 57 P.2d 901 (1936)	8
Fallbrook Irrigation District v. Bradley, 164 U.S. 112 (1896)	17
Gore v. Bingaman, 20 C.2d 118, 124 P.2d 17 (1942)	13
Gorman v. Washington University, 316 U.S. 98 (1942)	10
Gryger v. Burke, 334 U.S. 728 (1947)	17
Herb v. Pitcairn, 324 U.S. 117 (1945)	13
Herndon v. Georgia, 295 U.S. 441 (1935)	11
King v. West Virginia, 216 U.S. 92 (1910)	13
Martin v. Howe, 190 Cal. 187, 211 Pac. 453 (1922)	8
Missouri v. Gehner, 281 U.S. 313 (1930)	13
Moss v. Ramey, 239 U.S. 538 (1916)	13
Mutual Life Insurance Company v. McGrew, 188 U.S. 291 (1903)	10
Overton v. Vita-Food Corp., 94 C.A. 2d 367, 210 P.2d 757 (1941)	15
Prince v. Hill, 170 Cal. 192, 149 Pac. 578 (1915)	11

Pages

Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 11, 14
Rice v. Sioux City Cemetery, 349 U.S. 70 (1954) 18

Sanders v. Howard Park Co., 86 C.A. 2d 721, 195 P.2d 898 (1948) 11
Saunders v. Shaw, 244 U.S. 317 (1917) 13
Southern Power Co. v. North Carolina Public Service Company, 263 U.S. 508 (1924) 15
Stembridge v. Georgia, 343 U.S. 541 (1951) 14

Tracy v. Ginzberg, 205 U.S. 170 (1907) 16

United States v. U. S. Smelting Co., 339 U.S. 186 (1950) 13

Wilson v. Loew's Incorporated, October Term 1957—No. 33, 26 L.W. 3248 13

STATUTES

California Insurance Code, Sec. 1101 5

United States Code, Title 28, Sec. 1257 10

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OPINIONS BELOW

Petitioners refer to a written opinion of the District Court of Appeal (App. C to Petition) which is unreported in the official California Appellate Reports, but which appeared in the interim Advance California Appellate

Reports at the time it was rendered. This opinion of the District Court of Appeal became a nullity when the Supreme Court of the State of California granted a petition for hearing in 1956 and thereafter was no more effective than if it had not been rendered, except as a brief on the questions discussed. (See Footnote 8, infra, p. 8)

JURISDICTION AND RESTATEMENT OF QUESTIONS PRESENTED

Does jurisdiction exist and will certiorari be granted to review the judgment of a state court of last resort when:

1) *The federal question,* if any, was not properly raised and preserved in the state courts. It seasonably could have been but was not raised before the trial court, before the District Court of Appeal, and before the Supreme Court. It *was first raised in the petition for rehearing to the State Supreme Court,* whose opinion had fully affirmed the earlier decision of the trial court. *This petition was denied without opinion.*

2) Assuming for the sake of argument the existence of a federal question the judgment of the California Supreme Court rests on an adequate non-federal ground, in that:

a) The federal question was never raised in the trial or appellate courts until the filing of a petition for rehearing in the State Supreme Court and under California rules of procedure an appellate court will not consider points which are not raised in the court below or in the original brief and points raised for the first time in a petition for rehearing come too late.

b) It *affirms* the earlier decision of the trial court, based on substantially unchallenged find-

ings of fact as made by that court, with regard to the uncomplicated question of ownership of certain property upon the same principles of local and general law which had been urged throughout the litigation and without any consideration or discussion of any federal question.

3) No substantial or any federal question is presented since the judgment of the state court is solely concerned with a determination of controverted substantive questions of ownership of property based upon the particular individual facts of the instant case and under principles of local and general law, with full opportunity having been afforded to all parties in interest to be heard before every court in the state judicial system having any jurisdiction.

STATEMENT OF THE CASE

The principal respondents in this case are Industrial Indemnity Company, a stock company (hereinafter called Company), engaged in the casualty and workmen's compensation insurance business; Industrial Indemnity Exchange (hereinafter called Exchange), a reciprocal insurance exchange which was engaged in the workmen's compensation insurance business until 1949; and Industrial Underwriters, a partnership (hereinafter called Underwriters) which managed the Exchange as Attorney in Fact under the provisions of an Underwriters Agreement. The petitioners are former holders of policies of insurance issued by Exchange.

Certain pertinent facts which were overlooked or misstated in the petition should be emphasized.

Contrary to petitioners' statements (Brief, p. 6) of competition and diversion of business, the fact is that "there

was considerable interrelation between Exchange and Company but *no* competition." (Emphasis ours.) (App. A to Petition, 49 A.C. 259)[1] "Company has *never* been operated in competition with Exchange." (Emphasis ours.) (App. B to Petition, 117 C.A. 2d 537)[2]

With regard to the 1947-8 objections made by the Insurance Commissioner which led to the Transfer and Assumption Agreement the court found "The attorney and the Company—maintained that all they had done was proper under existing law, agreements and circumstances (their said position was later generally sustained in the findings herein)." (App. B to Petition, 117 C.A. 2d 524) It should also be noted that Underwriters decided in December, 1948 that no further policies would be issued in the Exchange (C.T. 73, Finding XII).[3] In this respect the court found that Underwriters had no obligation to issue any further policies, had the power to cancel all policies and liquidate subscribers' accounts and as Attorney in Fact could not be replaced by the subscribers (C.T. 72, 73, Finding XI). Since December 31, 1948 Exchange has been engaged in no business except for liquidation (C.T. 73, Finding XII). The execution of this Transfer and Assumption Agreement between Company and Exchange was approved by the Insurance Commissioner and 98% of the then subscribers of the Exchange (App. B to Petition, 117 C.A. 2d 525).

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(1) The reference "App. A to Petition" is to the decision of the Supreme Court of California (49 A.C. 257, 316 P.2d 966) to which the petition is directed, and the page references are to that decision as it appears in Appendix A to the Petition and as they appear in 49 A.C. 257.

(2) The reference "App. B to Petition" is to the first decision of the District Court of Appeal in 1953 (117 C.A. 2d 519, 256 P.2d 677) and the page references are to the decision as it appears in Appendix B to the Petition and as they appear in 117 C.A. 2d 519.

(3) The reference "C.T." is to the pages of the certified record constituting the Clerk's transcript. The reference "R" is to the pages of the certified record constituting the reporter's transcript.

With regard to the appeal after the first trial in 1950, it should be emphasized that the District Court of Appeal, *on its own motion* and without it having been previously suggested by any of the parties or the Insurance Commissioner, raised the question of the applicability of Section 1101 of the California Insurance Code to this agreement and held that, irrespective of good faith of the parties,[4] the approval of the Insurance Commisioner and 98% of the subscribers, the agreement was illegal and void under this Section as *then* written.[5] The Appellate Court, however, affirmed the decision of the trial court that cross-complainants (petitioners here) had no claim to the separate business of the Company. The Appellate Court then reversed the judgment and issued its remittitur with the very significant directions that the action for declaratory relief concerning the illegal agreement must be dismissed, and "as in the cross-actions, relief will be granted only with respect to the consequences of the illegality of the transfer and assumption agreement," (App. B to Petition, 117 C.A. 2d 540), the trial court shall grant cross-complainants "such relief as the court will deem fit to enable them to recover in their representative capacity for subscribers the business and assets obtained by Company in consequence of

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(4) In the concurring opinion of Justice Schauer in the Supreme Court in 1957, he notes, with reference to the decision of the District Court of Appeal in 1953, "the good faith of respondents, already conclusively shown." (App. A to Petition, 49 A.C. 275-276)

(5) The California Legislature amended Section 1101 of the Insurance Code in 1955 so that "such an agreement as that which gave rise to the current controversy may now be legally made and performed, thus indicating that no basic principle of public policy, fairness or justice was violated when it was executed in 1948" (App. A to Petition, 49 A.C. 277). It is apparent that because of the statutory amendment the peculiar questions of this case will not arise again and the results of this case can have no effect on the public or other litigants.

the agreement herein held to be invalid." (App. B to Petition, 117 C.A. 2d 540-541)[6]

Petitioners also neglect to point out that Company, following this decision, on November 4, 1953 transferred all business and assets of the Exchange then in its possession back to Underwriters as Attorney-in-Fact for Exchange, who had been granted by the Insurance Commissioner a certificate *for the purpose of conducting liquidation* of the Exchange and Underwriters accepted these funds and has since been acting in liquidation of the Exchange (C.T. 67-68, Finding III).

The Superior Court, pursuant to the remittitur issued by the Appellate Court (C.T. 1, 2), and on the basis of pleadings filed by all parties, tried and determined the issue of what business and assets of Exchange were obtained by Company in consequence of the illegal agreement. It should be particularly noted that the trial court specifically found, on the basis of all evidence introduced, that the business and assets were of a value of $323,300.84[7] and had been returned

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(6) It is apparent that the issue, of *what* business and assets Company had obtained from Exchange *in consequence of the invalidity of the agreement* and must be restored, had not been before or decided by the first trial court and was not necessary to the decision of the Appellate Court or decided by it. Thus there was not and could have been no law of the case on this point and this was the issue to be determined by the trial court on remand. This is expressly stated in the vacated decision of the District Court of Appeal in 1956 where the court states that its former opinion did "no more than to direct that appellants be allowed *whatever* recovery they might be entitled to in equity for the wrongful taking over of the business of the Exchange. *We did not consider, much less decide, the extent and nature of that relief*" (Emphasis ours—App. C. to Petition, p. 256). The Supreme Court in its decision expressly holds that "In view of the former decision on appeal the trial court was limited to a determination of this issue: What business and assets were obtained by Company in consequence of the 'Transfer and Assumption Agreement'?" (App. A to Petition, 49 A.C. 261)

(7) Under the contractual provisions of the illegal Transfer and Assumption Agreement, which had been declared void and could

by Company to Exchange, that prior to December 31, 1948 Underwriters had determined to issue no new policies in Exchange and that since December 31, 1948 Exchange has been engaged in no business except for liquidation, and that the business and assets of Exchange did *not* include either the items of Special Surplus or Attorney-in-Fact Fees (since these were exclusively the property of the Attorney-in-Fact under the particular facts of this case and the terms of the Underwriters Agreement. C.T. 70-73, 76, 77; Findings VII, VIII, IX, X, XII, XXI, XXV, XXVI) or profit earned by Company on insurance policies placed with Company after December 31, 1948 by former policyholders of Exchange (since the facts disclosed that these policies were not placed with Company as a consequence of the illegal agreement but as new voluntary, and independent pieces of business. C.T. 68-69, 72-75, 76-77, 78; Findings IV, V, XI,

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not therefore be performed, the subscribers would have received $1,018,589.07 (C.T. 67, Finding II). This figure was not, however, the true liquidating net worth of the Exchange but an adjusted net worth increased by concessions of Company and Underwriters and, contrary to petitioner's assertion (Brief, p. 8, 21), was not an amount which had been stipulated between the parties as being the value of the business and assets of the Exchange. The reason for the much lesser amount under the Court's judgment is that a) the Attorney-in-Fact had as a part of the illegal agreement waived its right to the Special Surplus, in the sum of $592,322.31, to which it was otherwise entitled under the terms of the Underwriters Agreement "in the event Exchange discontinues business—to defray expenses of and as compensation for liquidation" (C.T. 71, 72, Findings IX and X) and to which the Attorney reasserted its right after the finding of illegality and b) Company had, under the illegal agreement, agreed to absorb losses, if any, on policies then in force which it reinsured and these policies developed a loss of $156,600.53 (C.T. 69, Finding VI), which losses were for the account of the Exchange after the finding of illegality. The effect of the illegality and unenforceability of the agreement was to deprive the Exchange of these benefits. It should however be noted that, irrespective of this legal result, K. K. Bechtel, the president of Company, affirmed its intention to see that the subscribers in fact received whatever would have come to them under the technically illegal agreement, less costs of litigation (App. A to Petition, 49 A.C. 275).

XII, XIII, XIV, XV, XVI, XVII, XXII, XXX). The items of Special Surplus, Attorney in Fact fees and profit on Company policies were the additional items claimed by petitioners as part of Exchange business and assets. *No issue of due process or equal protection was raised at any time before the trial court.*

Petitioners then appealed and the District Court of Appeal reversed the judgment of the trial court. Contrary to the statement at p. 13 of the petition, this decision makes no mention of any law of the case stemming from its earlier decision as being controlling and as not having been followed by the Trial Court or disregarded by the Trial Court and states that it had not considered, much less decided, the nature and extent of relief. (See Footnote 6, *supra*, p. 6). *No issue of due process or equal protection was raised at any time before the District Court of Appeal.*

A petition for hearing was then granted by the Supreme Court of the State of California.[8] *No issue of due process or equal protection was raised at any time in these proceedings before the Supreme Court.*

The Supreme Court by majority opinion *affirmed* the judgment of the Trial Court on the principle that "It logically follows that since the trial court's findings are supported by evidence and covered the issues the Appellate Court had ordered retried, the judgment in the principal

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(8) Under California rules of procedure it is the unquestioned rule that the granting by the Supreme Court of a petition for hearing effectively nullifies the decision of the District Court of Appeal which ceases to have any effect except as a brief on the questions discussed, and the case is at large to be decided as if originally appealed to the Supreme Court. *Estate of Kent*, 6 C.2d 154, 156, 57 P.2d 901, 902 (1936); *Martin v. Howe*, 190 Cal. 187, 188, 211 Pac. 453, 454 (1922). The effect of this rule, contrary to petitioners' assertions (Brief, p. 14), is that petitioners here were appellants before the Supreme Court just as effectively as if they had appealed there directly (e.g. see the title of their Petition for Rehearing).

amount should be affirmed" (App. A to Petition, p. 266). The court observed that appellants (petitioners here) did "not attack these findings on the ground of insufficiency of the evidence" (App. A to Petition, p. 266), that "the evidence amply supports the finding, that future profits, Attorney Fees and the Special Surplus Fund were not items obtained by Company as a consequence of the illegal Transfer and Assumption Agreement" (App. A to Petition, p. 271-272), that "the foregoing findings, which are not disputed, show that • • • policyholders have not been injured by the execution of the Transfer and Assumption Agreement, and that they have received all to which they are entitled. Therefore, they have not suffered either injury or damage" (App. A to Petition, p. 272), and that "Company has not been unjustly or unfairly enriched" (App. A to Petition, p. 273).

Contrary to inferences (Petition, p. 22) of complete disagreement in the Supreme Court, Chief Justice Gibson, in a dissent concurred in by Justice Traynor, agreed that the law of the case was simply "that the subscribers are entitled to recover the business and assets obtained by Company as a consequence of that agreement" (App. A to Petition, p. 277-278); agreed that "there is sufficient evidence to support the trial court's finding that the business profits were not obtained as a consequence of the void Transfer and Assumption Agreement" (App. A to Petition, p. 279); but felt that as to the Attorney-in-Fact Fees and Special Surplus only issues of law based on undisputed facts were presented and that the conclusion of the trial court and the majority of the Supreme Court on these points was erroneous. It was only Justice Carter, in a separate dissent, who disagreed with everyone else.

Then followed the *petition for rehearing. Here for the first time in the 10-year history of the litigation* (which had

involved two trials on the merits and three appeals), *petitioners raised the question of due process and equal protection.* In the answer to the petition for rehearing it was argued, among other things, that under California law this point came too late (Answer to Petition for Rehearing, p. 9). *This petition was summarily denied by the court without opinion.*

ARGUMENT

A. The Petition Should Be Denied Because the Federal Question Sought to Be Reviewed Was Not Properly Raised and Preserved in the State Courts as Indicated by the Certified Record.

It is the unquestioned rule that before certiorari can or will be granted it is petitioners' burden to show affirmatively that the Supreme Court has jurisdiction (*Gorman v. Washington University,* 316 U.S. 98, 101 (1942)). Since jurisdiction here is allegedly based upon subparagraph (3) of Section 1257 U.S.C. Title 28, it must appear that the federal question has been "specially set up or claimed." In this respect it is clear that the court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law (*Edelman v. California,* 344 U.S. 357, 358 (1952)).

Under the California rules of procedure appellate courts will not consider contentions which have not been made in the trial court or lower appellate courts, or in the original briefs filed in the Appellate Court. [*Mutual Life Insurance Company v. McGrew,* 188 U.S. 291, 309 (1903) and California cases therein cited: *Davenport v. Stratton,* 24 C.2d 232, 242, 243, 149 P.2d 4, 9 (1944)]. It is admitted by petitioners in this case, and apparent from the record, that the federal questions of due process and equal protection were not raised in the trial court, were not raised before the District

Court of Appeal, and were not raised before the Supreme Court prior to its final decision (Petitioner's Brief, pp. 17 and 34).

The question was raised for the first time before the California Supreme Court in a petition for rehearing which was summarily denied without opinion (Petition, p. 2). Nothing is better settled than the proposition that a federal question comes too late when raised for the first time in a petition for rehearing, unless the court passes on the question so raised. [*Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945); *American Surety Co. v. Baldwin,* 287 U.S. 156, 163 (1932); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935)]. This rule is in accordance with the procedural rule followed in California to the effect that "an argument based upon a point not mentioned in the original brief of the petitioner will be of no avail on its demand for a rehearing. The judgments of appellate courts will not be upset in order to grant a rehearing unless the basis of the petitioners' demand was presented in his opening brief." [*Sanders v. Howard Park Co.,* 86 C.A. 2d 721, 723, 195 P.2d 898, 899 (1948); see also *Prince v. Hill,* 170 Cal. 192, 195, 149 Pac. 578, 580 (1915); *Bradley v. Bradley,* 94 C.A. 2d 310, 312, 211 P.2d 638 (1949)].

We are not concerned here with a situation where the Supreme Court acted upon the petition for rehearing and made a decision on the point raised, since the petition for rehearing was denied without opinion.

Petitioners attempt to avoid the necessary result of these rules of law by claiming "surprise" upon the basis that they had no reason to anticipate that the Supreme Court would affirm the judgment of the trial court and that the federal question was created by the decision of the Supreme Court which petitioners had not expected. This statement on its

face is ridiculous. If the federal question arose at all it necessarily arose at the latest when the Superior Court entered its judgment in 1955. It was at that time that petitioners must necessarily have been aware that their views of the case were not being followed and if there was any federal question involved it should have been raised at that time. This could have been done in a motion for new trial before the court which tried the case. It could thereafter have been raised in the course of petitioners' appeal to the District Court of Appeal, in petitioners' answer to the petition for hearing by the Supreme Court and it could have been raised as a last resort in the two oral arguments before the Supreme Court.

An unrealized hope or belief of petitioners that the ultimate result would be different when the case was finally brought to and decided by the Supreme Court is no surprise. The contention that petitioners expected that the Supreme Court would follow an earlier decision of the District Court of Appeal which, according to petitioners' views, established a certain law of the case completely overlooks the fact that the trial court failed to follow petitioners' views. It was at that time that the die was cast. It is impossible to see how a person can be surprised by an ultimate appellate decision which affirms a trial court's decision upon the same grounds which have been urged throughout the proceeding.[9]

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(9) Petitioners claim at page 33 of their Brief that the rule of law of the case was binding upon the California Supreme Court. The petitioners' beliefs as to what constituted the law of the case are directly controverted by the District Court of Appeal and the Supreme Court (see Footnote 6, *supra*, p. 6). Assuming for the sake of argument that petitioners' beliefs in this respect were correct, the fact still remains that in California an appellate court is not absolutely precluded by law of the case from reconsidering earlier questions—the notion of limited power has been rejected and the courts treat the doctrine as one of policy and discretion. It is a

This is not a situation falling within the principle of the surprise cases. There was here ample opportunity to earlier present the objection and in fact imperative notice by the trial court's decision that it should be presented. This is not a case where the federal claim arose from the unanticipated disposition of the case at close of proceedings in the State Supreme Court (e.g. *Saunders v. Shaw,* 244 U.S. 317, 320 [1917]) nor is the federal claim based upon an unanticipated act of the Supreme Court in giving a new construction to a statute (e.g. *Missouri v. Gehner,* 281 U.S. 313, 320 [1930])or a situation where an unanticipated reversal of prior decisions concerning procedure left the claimant without relief (e.g. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 677 [1930]).

B. The Petition Should Be Denied Because the Judgment Is Based on Independent Non-Federal Grounds Adequate to Sustain It

There are in this case two independent non-federal grounds, either of them being adequate to sustain the judgment. In such a case certiorari should be denied. [*Wilson v. Loew's Incorporated,* October Term 1957—No. 33, 26 L.W. 3248; *Herb v. Pitcairn,* 324 U.S. 117, 124, 126 (1945)].

1) The first of these is that the federal questions not having been seasonably raised in accordance with the requirements of state law, noncompliance with such local law is an adequate state ground for the decision below

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mere rule of procedure and not one of substance. *England v. Hospital of Good Samaritan,* 14 C.2d 791, 795, 97 P.2d 813, 814, 815 (1939); *Gore v. Bingaman,* 20 C.2d 118, 122, 124 P.2d 17, 20 (1942). This is also the Federal rule (*U.S. v. U. S. Smelting Co.,* 339 U.S. 186 at 199 (1950). As a consequence it is clear that "there is nothing in the Constitution of the United States * * * to prevent a State from allowing past action to be modified while a case remains in court." This is so because the rule of law of the case "expresses only the practice of courts generally to refuse to reopen what has been decided, not a limit to their power". *King v. West Virginia,* 216 U.S. 92, 100-101 (1910). See also *Moss v. Ramey,* 239 U.S. 538, 546, 547 (1916) to the same effect.

[*Edelman v. California, supra,* 344 U.S. 357, 358 (1952); *Radio Station WOW v. Johnson,* 326 U.S. 120, 128, 129 (1945)]. It has been pointed out that under California rules of procedure (*supra,* pp. 10, 11) a point which has not been raised in the courts below or in the opening brief before the Supreme Court will not be considered by the Supreme Court on a petition for rehearing. The federal question here urged was concededly not raised until the petition for rehearing. The Supreme Court did not render any decision on the petition for rehearing and denied it summarily. It is clear that in this situation "the federal claim there made cannot serve as a basis for review by this Court" (*American Surety Co. v. Baldwin,* 287 U.S. 156, 163 (1932)).

The Supreme Court of California could have denied the petition for rehearing on the basis of the state rule of procedure that new points raised at this time come too late, but rendered no opinion. It is the unquestioned rule that where, as here, the highest court of the state delivers no opinion in denying the petition for rehearing and it appears, as here, that the judgment *might* have rested upon a nonfederal ground the Supreme Court will not take jurisdiction to review the judgment (*Stembridge v. Georgia,* 343 U.S. 541, 547 (1951)). Such an order of summary denial cannot be taken as a *decision* on a federal question presented in the petition; especially is this so where such a presentation is too late under state rules and could have been denied on that non-federal ground. [*Bailey v. Anderson,* 326 U.S. 203, 206, 207 (1945)]

2) The second independent nonfederal ground adequate to sustain the judgment sought to be reviewed is that judgment went against petitioners because the court found as a matter of state law that the basic and uncomplicated issue presented for determination was what property belonged to

petitioners, then found that the findings of the trial court in this respect were fully supported by the evidence and covered all of the issues to be tried, and therefore held that the judgment should be affirmed (*supra*, pp. 8, 9).

A question of ownership of property is necessarily a question of fact and construction of the contracts and relationships existing in the particular case in the light of those facts. The determination of those facts is for the trial court and they will not be disturbed except upon a showing that the findings of the trial court are unsupported by the evidence. In the absence of such a showing the findings are binding on the reviewing court, whose "power begins and ends with a determination as to whether there is any substantial evidence to support them" (*Overton v. Vita-Food Corp.*, 94 C.A. 2d 367, 370, 210 P.2d 757, 759 (1941)). Petitioners were afforded full, complete and adequate opportunity to present their views in every court having any jurisdiction of the matter. The decision of the Supreme Court was therefore based upon settled and established state principles of law which govern appellate courts in reviewing judgments of the trial courts. In short, there was no showing by petitioners that the items which they claimed were in fact their property and no showing that any of these items were a part of the business or assets obtained by Company in consequence of the illegal agreement.

The decision was obviously based upon the principle that before a person can claim property he must show that it belongs to him and since the facts, as established in the findings of the trial court and affirmed by the Supreme Court, are to the contrary neither injury nor wrong existed. Situations of this type—primarily factual—do not furnish grounds for granting certiorari [*Southern Power Co. v. North Carolina Public Service Company*, 263 U.S. 508, 509 (1924)].

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Petitioners' contention that the decision of the Supreme Court of California was so grossly mistaken as to be impossible can only be applicable if it is assumed that the items claimed by the petitioners were in fact their property and a part of the business and assets. Since, however, as the decision clearly points out, the facts are to the contrary the argument begs the question. Petitioners' contention that the action was arbitrary completely overlooks and ignores the actual facts as found and the complete and full opportunities afforded for hearing before all courts having jurisdiction.

C. The Petition Should Be Denied Because There Is No Substantial or Any Federal Question Which Exists

Even if we are to assume that the decision of the Supreme Court of California was wholly erroneous in its determination of the ownership interests of petitioners, no question under the Fourteenth Amendment arises. Petitioners had full notice and opportunity to be heard and all actions were taken in accordance with the state's ordinary and regular procedure. The court, proceeding entirely upon principles of general and local law and giving all parties interested in the question an opportunity to be heard, decided that petitioners had no right to and did not own the items which they claimed.

> "The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to all such property. * * * the Fourteenth Amendment did not impair the authority of the states, by their judicial tribunals, and according to our settled usages and established modes of procedure, to determine finally, for the parties before it, controverted questions as to the ownership of property, * * *."
> [*Tracy v. Ginzberg*, 205 U.S. 170, 178 (1907)]

As is further pointed out in the case just cited, the opposite view would mean that "every judgment of a state court, involving merely the ownership of property, could be brought here for review * * * a result not to be thought of." [See, also, *Gryger v. Burke,* 334 U.S. 728, 731 (1947)]

It is a settled principle of law that a state court decision following its settled rules and in its regular course of procedure cannot be said to deprive a party of due process or deny him equal protection. The Supreme Court is not intended to be an appellate court for every unsuccessful litigant in a state court who questions the jurisdiction or the merits of a decision against him. If he has been afforded a fair trial according to applicable modes of procedure which do not involve a right secured by the Federal Constitution or an Act of Congress or Treaty then it is not possible to hold that he has, without due process of law, been deprived of his property. [*Davidson v. New Orleans,* 96 U.S. 97, 104 (1877); *Fallbrook Irrigation District v. Bradley,* 164 U.S. 112, 157 (1896)]

There is no Federal law, treaty or constitutionally secured right which is in question, nor is there any claim of repugnance of state statute to the Federal Constitution, Treaties or Laws. The case does not involve action under a state statute or regulation or municipal ordinance, such as was the situation in all of the cases cited at pp. 18-19 of the Petition. It is a simple case of a litigant who, after a full and complete hearing and final determination of the extent of his property ownership, received less than he wanted.

It should also be noted that the situation here involved is not possible of recurrence since the statute which gave rise to the dispute has been amended so as to now permit the legal making and performance of an agreement such as that which gave rise to this current controversy (see Foot-

note 5, *supra,* p. 5). Before this court will take jurisdiction it must appear that the federal question is one of substance. This court does not sit for the benefit of particular litigants [*Rice v. Sioux City Cemetery,* 349 U.S. 70, 74 (1954)]. It is apparent that the "episodic" situation in the instant case will be of no importance beyond the particular facts and parties involved.

Petitioners' claim of denial of equal protection (Petition, p. 31) on the basis of discrimination by a taking of property without compensation for the benefit of another and refusal to permit petitioners to retrieve property wrongfully obtained when other persons are permitted to do so, again begs the entire question at issue in the courts below which was: What property did belong to petitioners? The claim of denial of equal protection by alleged arbitrary refusal to apply the settled law of the state (Petition, p. 32) begs the same question since particular principles of general trust and fiduciary law can only be applied to facts as they exist in a particular case, and in the instant case the facts as established precluded the application of the principles contended for by petitioners.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

MAX THELEN
ROBERT L. BRIDGES
Attorneys for Respondents

THELEN, MARRIN, JOHNSON & BRIDGES
EDWARD J. RUFF
Of Counsel